November 12, 2004

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EX PARTE – VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: *Unbundled Access to Network Elements,* WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338
Notice of Oral and Written Ex Parte Presentation

Dear Ms. Dortch:

On November 10, 2004, Tina Pidgeon and Lisa Youngers, both of General Communication, Inc. ("GCI"), and John Nakahata of Harris, Wiltshire and Grannis met with Matt Brill, Senior Legal Advisor to Commissioner Abernathy, Gavin Gaukroger of Commissioner Abernathy's Office and separately with Jessica Rosenworcel, Legal Advisor to Commissioner Copps, regarding the above-captioned proceeding. On November 12, 2004, Ms. Pidgeon and Ms. Youngers also met with Scott Bergmann, Legal Advisor to Commissioner Adelstein and Ms. Pidgeon met separately with Dan Gonzalez, Senior Legal Advisor to Commissioner Martin, regarding the same.

In the meetings, GCI explained that it seeks a simple and non-controversial clarification of the standing obligation for ILECs to provide voice grade access to DLC-fed loops: if the ILEC is unable to provide loop access to a home-run copper loop, universal DLCs, or multihosting at the DLC, then the ILEC must provide the unbundled loop in combination with unbundled switching and transport. For its part, ACS has provided no rebuttal to this argument, instead forwarding a standard for the immediate elimination of loop access altogether through a retail market share test—a request far beyond the scope of this proceeding and wholly unsupported on the record of this and the *Triennial Review* proceedings. Indeed, this latest ACS-proposed "test" is nothing more than a repackaging of the position it previously advocated on retail market share—which the Commission squarely rejected—to immediately end local competition in Anchorage based on a standard that would foreclose competitive advancements throughout Alaska and elsewhere. The Commission should reject this unabashed attempt to shut down competition in one of a few markets where facilities-based competition is taking hold and evolving for the benefit of consumers.

I. No Basis Exists to Disrupt Unbundled Access to Mass Market Loops

ACS admits that "although ACS sought only relief with regard to DS-3 and dark fiber loops [in the Alaska impairment proceedings] it seeks relief with regard to all enterprise and mass market loops here."[1] Seeking expansion of this proceeding beyond its scope, ACS is pushing for the elimination of the unbundling requirement for all loops, including mass market loops, even though no party challenged the national finding of impairment for this element. Significantly, ACS' request for unbundling relief effectively based on a retail market share assessment is no different from the one already rejected by this Commission.

A. ACS Has No Grounds to Challenge Unbundled Access to Mass Market Loops.

Clearly, the issue of access to DS-0 or mass market loops is not before this Commission. In the *Triennial Review Order,* the FCC found impairment as to DS0 loops because mass market loops provide access to a fundamental bottleneck facility.[2] In reaching this conclusion, the FCC was clear that "the record indicates that deployment of alternative local loop facilities for the purposes of providing telecommunications services to the mass market has been minimal."[3] Moreover, the FCC stated that "the record shows that incumbent LECs continue to control the vast majority of voice-grade local loops throughout the nation."[4] Consistent with these findings, no single party challenged the Commission's national finding of impairment as to mass market loops. Thus, continued access to unbundled mass market loops is not subject to the *USTA II* remand.

The Commission has recently affirmed this status in connection with access to hybrid fiber/copper loops. In its recent reconsideration order concerning fiber-to-the-curb loops, the FCC specifically stated that "[i]n overbuild situations, because incumbent LECs have an entry barrier within their sole control, we conclude, as with FTTH loops, that competitive LECs should have continued access to either a copper loop or a 64 kbps transmission path in those situations."[5] As such, the Commission continues to acknowledge both persisting ILEC control of critical last mile facilities and the obligation of incumbents to continue to provide competitors with access to mass market loops. Thus, ACS' proposal to eliminate unbundled access to mass market loops is contrary to its clear legal obligations under the Act and even the most recent

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[1] ACS Reply Comments at 13;

[2] *Triennial Review Order* at ¶¶ 222 – 224. *see also* GCI Reply Comments at 22. In addition, not only has ACS failed to provide any evidence to show non-impairment as to access to unbundled DS-1 loops, ACS did not even challenge the national impairment finding of DS-1 loops in the Alaska state impairment proceedings. ACS does not deny this point here, but instead tries to inappropriately expand this proceeding to challenge DS-1 loops now without any support.

[3] *Triennial Review Order* ¶ 222.

[4] *Id.* at ¶ 224.

[5] *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, (rel. Oct. 18, 2004) at ¶ 14.

policy pronouncements by this Commission. Any finding now that access to unbundled loops was no longer required would be the epitome of arbitrary and capricious decisionmaking.

B. ACS Still Seeks to Deny Access to Loops Based on Retail Market Share.

ACS continues to propose a retail market share test for mass market loop impairment for the simple purpose of eliminating competition in Anchorage, and ultimately throughout its Alaska service areas. ACS claims that the FCC should presume no impairment as to mass market loops where a CLEC: (1) has 30 percent or more of the local exchange market served by the ILEC; (2) can reach 60 percent or more of the customers in the market using its own loop facilities; and (3) is actually providing local exchange services over some portion of its own facilities."[6] This test is nothing more than a dressed-up version of ACS' previously proposed retail market share test, which the FCC rejected in the first round of the *Triennial Review* and must reject it once again. ACS' test does not provide any assessment of CLEC impairment, and is obviously designed to stop UNE-loop competition before deployment of loop substitutes can progress.[7]

As to ACS' first criterion, the FCC has already rejected ACS' reliance on market share as a reason to end access to UNEs, concluding that retail market share is not indicative of whether impairment exists.[8] Specifically, in rejecting ACS' previous request that the FCC "not require unbundling in markets where competitors have achieved a particular market share, where competitors have a certain number of collocations, or where consumers have a choice of facilities-based providers,"[9] the FCC concluded that it "not . . . base [its] impairment determination on whether the level of retail competition is sufficient such that unbundling is no longer required to enable further entry."[10] Recognizing that "the relationship between retail competition and unbundling is complex," the FCC found that "[i]n many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs; thus, a standard that takes away UNEs when a retail competition threshold has been met could be circular."[11] These Commission findings are certainly applicable in Anchorage where, without access to the loop, GCI would lose the ability to access more than two-thirds of its current customers—immediately dropping GCI's retail market share far below the 30 percent threshold that ACS claims to be the relevant measure.[12]

A retail market share test also suffers from operating as an effective "cap" on competition, permitting a new entrant to be successful only to a certain point, then immediately eliminating its ability to capture new customers, or even retain the ones it has on unbundled loops once the designated threshold is exceeded. While some level of retail market share may be

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[6] ACS Comments at 14.
[7] *See* GCI Reply Comments at 23.
[8] *See id.* at 9 -13 and 24.
[9] *Triennial Review Order* at ¶ 115 (citing ACS *Ex Parte* Letters, dated Jan. 6, 2003 and Jan. 16, 2003).
[10] *Id.* at ¶ 115.
[11] *Id.*
[12] It is not surprising that in its Comments, ACS demanded no transition period whatsoever for the Anchorage market after any relevant finding of non-impairment. ACS Comments at 19-20. This plainly reveals ACS' sole interest is to disrupt competition, not to produce any bona fide assessment of non-impairment.

indicative of the need for retail rate deregulation and even shared carrier-of-last-resort requirements (depending on the circumstances)—both of which GCI has advocated in its local service markets, it does not substantiate the need to eliminate access to the wholesale input that is necessary for the competitor to provide the retail service.

The second criterion—that unbundled loop access must be denied where the competitor "can reach" 60 percent or more of the customers using its own loop facilities—is so vague as to be meaningless. As an initial matter, ACS would deny unbundled loops based on the presence of facilities that could "reach" a customer, even if the facilities could not actually be used to serve that customer. This is a meaningless standard, proposing denial of loop access *where no alternatives exist*. And even if this prong did presume that the applicable facilities must actually be equipped to provide local services to customers, it fails to address important issues like service to different market segments and customer classes. As a final matter, GCI does not even meet the requirement in the Anchorage market. As detailed below, ACS has continues to overstate GCI's ability to provide cable telephony services, ignoring both the significant investment and plant upgrades required to make cable plant capable of voice telephony and the plant footprint, in an obvious attempt to interrupt the development of UNE-L competition in Anchorage, essentially based on a retail market share assessment.[13]

ACS has now offered a reformulated prong in its Reply Comments that is even more far-reaching that the first version. ACS' revised criterion would now require only that a CLEC "*has deployed distribution facilities* that pass 60 percent or more of the customers in the market (regardless of technology)."[14] On this basis, ACS would have the Commission presume that the mere presence of cable plant (for example) in a market—without the significant investments or plant upgrades needed to make it capable of delivering voice communications —is sufficient to demonstrate that access to mass market loops is no longer necessary. This is nonsensical. Under ACS' latest iteration then, the presence of any "distribution facility"—be it cable, electric, or even wireless—would support a finding of non-impairment practically everywhere as to mass market loops for any new entrant in the local services market, regardless of the actual capacity to provide voice communications over those facilities, totally eviscerating the most basic element of the unbundling regime Simply stated, this criterion is not a credible indicator of non-impairment.

Similarly, ACS' proposed third criterion to show non-impairment as to mass market loops—that the CLEC "is actually providing local exchange services over some portion of its own facilities in that market"—also provides not meaningful addition to its retail market share standard.[15] The requirement that the CLEC provide exchange services over "some portion" offers no assessment of the competitive alternatives in the market, and does not even require any nexus between the "some portion" that the CLEC provides and the element ACS seeks to deny—loops. "Some portion" of CLEC facilities could be a switch or transport, having nothing to do with the provision of loop facilities. As with the second criteria, this criterion elicits no

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[13] *See* GCI Reply Comments at 14-19.
[14] ACS Reply Comments at 13 (emphasis added).
[15] *Id.*

information to assess non-impairment for loops. With the detritus scraped away, only a retail market share test remains, which must be rejected for the same reasons as before.

C. Implementation of the ACS Retail Market Share Test Would Immediately Deny The Vast Majority of Anchorage Consumers Competitive Choice.

ACS repeatedly claims in its filings that GCI is not impaired without access to certain ILEC facilities because of the existence of its cable plant and criticizes GCI for not demonstrating why it cannot "reach" certain customers "via its own cable distribution plant."[16] This is entirely misleading. As GCI has described in this docket, there are significant investment and physical upgrades needed on a neighborhood-by-neighborhood basis and to the cable plant for the facilities to be hospitable to voice communications.[17] GCI's planned conversion of customers to its own facilities, to the greatest extent possible, will require years to implement.[18] This labor and resource intensive process does not happen overnight, with approximately 5,000 lines equipped in Anchorage thus far. This is consistent with the FCC's statements in the *Triennial Review Order* that "retrofitting cable infrastructure to support cable telephony and broadband services requires substantial investment and modification."[19] As such, access to critical unbundled mass market loops is not justified while such facilities deployment is still developing. To do so would be to deny the overwhelming majority of GCI customers their choice in local service provider.

Nor is there any support for ACS' assertions that loop access—as already required by this Commission—undermines the incentive for GCI to continue its investment in its own facilities.[20] The facts demonstrate the exact opposite. GCI has every incentive to make use of its significant switch and transport facilities investment to date.[21] Ironically, it is ACS' attempt to eliminate access to loops that could be expected to interrupt the continued deployment of competitive facilities. It is access to UNE loops that has allowed GCI to build a customer base and to make use of its switch and transport deployment. To eliminate access to the mass market loops now would render GCI's investment largely useless.

Moreover, even ACS reveals that its claims regarding the incentive for competitive facilities deployment are disingenuous. Throughout its comments, ACS points to GCI's "extensive facilities deployment" in the Anchorage market as a justification to *end* ACS' unbundling obligations.[22] Though ACS' claims are overblown to support its otherwise unsustainable request, even a more measured assessment of GCI's deployment demonstrates that

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[16] ACS Reply Comments at 3.
[17] GCI Reply Comments at 14-15.
[18] *See id* .at 16.
[19] *Triennial Review Order* at ¶ 229.
[20] ACS Reply at 8-9.
[21] *See* GCI Comments at 8 ("GCI prefers to maximize its investment and use its deployed facilities to serve customers without having to rely on the facilities of the ILEC."); *see also* GCI Reply Comments at 20 ("Having installed its own switch and invested in collocations in the five ACS central offices and two switch remotes, GCI has every incentive to utilize these deployed facilities to serve as many customers as possible.")
[22] ACS Comments at 9.

ACS' bald assertion that continued access to mass market loops will discourage CLEC facilities investment is simply not credible.

ACS also claims that if GCI cannot access customers via its own facilities, perhaps GCI should "provid[e] service via resale as an entry strategy".[23] Resale plainly is not an acceptable alternative to facilities-based UNE-L service to customers and is yet another avenue for ILECs to block competitive in-roads. Resale denies CLECs the opportunities for access charge revenue and USF support that are available for facilities-based competition, placing the CLEC on a level "revenue opportunity" playing field with the ILEC and providing critical revenues for funding further and deeper facilities investment.[24] Replacing facilities-based UNE-L competition with resale simply is an unequal trade, meant to disadvantage competitors.

Finally, ACS continues to claim (wrongly) that GCI's cable plant can serve the entire Anchorage market, arguing that "GCI has effective facilities-based access to all or virtually all homes and businesses in Anchorage." This is false. First, GCI's cable plant cannot be used as a UNE-loop alternative prior to significant plant upgrades. As GCI has described, it is undertaking these upgrades, but—as the Commission recognized in the *Triennial Review Order*—these upgrades are not immediate. Second, ACS vastly overstates GCI's access to the business market via its cable facilities in Anchorage. As in most locations, the cable footprint is concentrated in residential locations. This fact is apparently not lost on ACS, whose CEO recently told investors GCI's "plant that's capable for telephony over cable addresses a portion but not all of the ACS plant clearly."[25] This is just a continuation of ACS' past practices in this proceeding of telling the FCC one story to try to stop competition, and then telling a different story elsewhere.[26] ACS' own admission, therefore, disproves its blithe claims that denying UNE loop access would not have any impact on competition in Anchorage.

II. Unbundled Element Access is a Necessary Remedy for Blocked Loop Access

ACS correctly notes that "GCI presents its [unbundled element access] argument not in terms of 'impairment'".[27] Precisely. GCI's argument regarding unbundled element access (loop, switching and transport) in this proceeding is not about switching and not about assessing impairment. That determination has already been made with respect to mass market loops, and it is unassailable. Rather, GCI's purpose here is to give full effect to the Commission's directive that ILECs must provide access to the entire loop (from central office switch to the customer

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[23] ACS Reply at 7.
[24] GCI Comments at 23.
[25] Third Quarter 2004, Alaska Communications Systems Group Earnings Conference Call, October 28, 2004, Transcript at 12.
[26] ACS used to report that unbundling would drive it out of business. *See, e.g.*, *Ex Parte* Letter from Karen Brinkmann, Counsel to ACS, CC Docket Nos. 01-338, 96-98, 98-147 (filed Jan. 16, 2003) ("Without an end to the regulatory advantages bestowed on GCI, . . . ACS will be forced out of the market, putting an end to any benefits of competition that were achieved."). Now that ACS' continued success has put the lie to that claim (including a recently announced 12.4 percent annual dividend to shareholders, *see* Anchorage Daily News, "ACS Plans Cash Dividend Payouts," Oct. 29, 2004, E-1), it apparently has moved on to its next set of trumped up justifications for ending competition.
[27] ACS Reply Comments at 4.

premises) in all cases, including hybrid fiber/copper loop deployments. Affirmance of this remedy for loop access is critical to the extent that the Commission takes steps to restrict access to standalone elements comprising UNE-P and as current UNE-P providers step up transition to UNE-loop provisioning.

As GCI has demonstrated in this proceeding, where the ILEC network architecture blocks access to the loop through deployments of non multi-hostable devices, including DLCs, the FCC should clarify that the combination of elements—unbundled switching in combination with unbundled transport and loops—must remain available as a remedy where access to the most fundamental UNE, the loop, is denied.[28] Having no substantive response to GCI's actual position, ACS sets up a straw man, claiming that GCI seeks unbundled switching.[29] ACS then knocks down its own straw man with the bold observation that GCI has never ordered unbundled switching in Anchorage as a standalone UNE.[30] This should hardly be surprising, as GCI has deployed its own switching. Of course, ACS' observation is meaningless, because GCI's argument is not about seeking access to unbundled switching. It is about getting access to the loop—preferably using its own switching,[31]but where this is not possible, an alternative method for loop access is required. And in addition to spare homerun copper loops, UDLC deployment, and multihostable IDLC deployment, the Commission should specify that unbundled element access is another technically feasible alternative.

ACS focuses on the nine percent of lines that GCI cannot currently access because of certain IDLC deployments by ACS.[32] Notably, ACS never denies that its current network architecture blocks GCI's unbundled loop access to that group of customers.[33] More importantly, there is nothing to stop ACS—or any other ILEC—from widespread deployment of devices that do not support multihosting and make large chunks or the entirety of the market inaccessible to CLECs by blocking access to the "last mile" loop facility. ACS could render GCI's existing switching and transport investment largely useless by denying access to customer

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[28] *See* GCI Reply Comments at 20-21.

[29] ACS' arguments concerning Fairbanks and Juneau also miss the point. ACS claims that it would be "premature" for the FCC to make any impairment findings as to these two markets at this time because ACS and GCI have entered into a settlement agreement, governing access to UNEs at current rates until January 1, 2008. ACS Reply at 3 and 16. This position ignores the core purpose of this proceeding: to develop rules that are generally applicable to all markets and all entities. In this respect, the competitive conditions in any and all markets is relative to the Commission's development of generally applicable rules, regardless of what agreements govern today and will continue to govern following the adoption of those rules. The fact that there is an operative agreement between ACS and GCI that will apply notwithstanding the rules adopted on remand is not dispositive of what rules should apply elsewhere (in the absence of such an agreement) or upon expiration of that agreement. GCI seeks no individual adjudication of impairment in these two locations at this time, but fully expects that the parties will be mindful of the rules in place upon the expiration of those agreements and will act accordingly at that time.

[30] ACS Reply at 5.

[31] Because the state commissions were tasked in the *Triennial Review Order* to make findings of impairment (or non-impairment) on an element-by-element basis, GCI presented this issue to the Alaska commission as an "exceptional source of impairment," requiring access to unbundled switching, transport, and loop even where GCI had deployed switching facilities.

[32] ACS Reply at 2.

[33] Nor does ACS even once address the fact that it has denied access to 29% of the loops in Fairbanks and 47% in Juneau through ACS deployment of remote terminals that do not include multi-hostable DLCs. These numbers are not insignificant and must be addressed through GCI's remedy proposal.

loop. GCI's proposed alternative remedy creates the right incentives to ensure that ILECs do not deploy non-multihostable devices for the purpose of disrupting the competitive market any further.

Conclusion

For the reasons stated herein and in the record of this proceeding, the FCC should reject ACS' proposals to deny CLECs unbundled access to mass market loops. Grant of this unsupported demand would deny customer competitive choice in Anchorage, other markets in Alaska, and undoubtedly markets outside of Alaska, as well, in the face of an unchallenged and incontrovertible record of nationwide impairment for mass market loops. Instead, the Commission should specify that when an ILEC cannot meet its obligation to provide unbundled loop access through spare homerun copper loops, UDLCs, or multihostable IDLCs, then the ILEC must provide access via unbundled element access to the loop, switching and transport.

In accordance with the Commission's rules, a copy of this letter is being filed in the above-captioned proceeding. If you have any questions, please contact the undersigned at (202) 457-8815.

Sincerely,

/s/
Lisa R. Youngers
Federal Regulatory Attorney

cc: (via electronic mail)
Christopher Libertelli
Matthew Brill
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